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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

PEAT MANUFACTURING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 9, 1982

QUESTIONS PRESENTED

1. Whether the finding of a violation of the National Labor Relations Act ("NLRA") which was never alleged in nor amended into the complaint nor litigated at the hearing, and therefore was not in issue, violates petitioner's due process rights guaranteed by the Fifth Amendment.

2. Whether the court of appeal's conclusional decision (finding a threat), which conflicts with other courts of appeals' decisions in cases involving substantially the same facts, violates petitioner's, and potentially all employers', First Amendment free speech rights to apprise employees as to statements made during collective bargaining negotiations about replacement of strikers.

3. Whether the decision below is so grossly erroneous as to result in a miscarriage of justice which could affect all employees' Constitutional and statutory rights (not) to assemble or associate in the future.

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PEAT MANUFACTURING COMPANY, Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Peat Manufacturing Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 22, 1982.

OPINION BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit appears in the appendix hereto as Exhibit "1".

The decision and order of the National Labor Relations Board (hereinafter alternatively referred to as the "Board" or "respondent"), reported at 251 NLRB No. 153, appears in the appendix hereto as Exhibit "2". The judgment of the Court of Appeals for the Ninth Circuit appears as Exhibit "3" and the court of appeals' order denying the petition for rehearing appears as Exhibit "4" in the appendix hereto.

JURISDICTION

The memorandum opinion of the court of appeals was entered on February 16, 1982. A timely petition for rehearing was denied on April 13, 1982. This petition for certiorari was filed within 90 days of April 13, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the finding of a violation of the National Labor Relations Act ("NLRA") which was never alleged in the

complaint nor litigated at the hearing, and therefore was not in issue, violates petitioner's due process rights guaranteed by the Fifth Amendment.

2. Whether the court of appeals' decision, which conflicts with other courts of appeals' decisions in cases involving substantially the same facts, violates petitioner's, and potentially all employers', First Amendment free speech rights.

3. Whether the decision below is so grossly erroneous as to result in a miscarriage of justice which could affect all employees' rights in the future.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances.

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 157: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization in section 158(a) (3) of this title.

Section 158(c): The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

Peat Manufacturing Company (hereinafter alternatively referred to as "Peat" or "petitioner") is engaged in the manufacture and distribution of zinc and aluminum die casting and plastic injection molding. On May 19, 1977, a representation election was conducted at Peat's facility under the supervision of the Board's Region 21. On September 15, 1977, the Board certified Produce, Refrigerated and Processed Foods and Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") as collective bargaining representative for Peat's production and maintenance employees. Thereafter, representatives of Peat and the Union met on many occasions to negotiate a collective bargaining agreement.

In response to numerous employee

requests for information about the negotiation sessions, Peat's general manager, Bob Murphy, met with the employees on two occasions in June 1978. These meetings were held for the sole purpose of informing the employees about the status of the negotiations. Murphy described the proposals which had been presented by Peat to the Union at the bargaining table. Murphy's remarks were translated for the Spanish-speaking employees.

One month later, in July 1978, a petition to decertify the Union as the employees' collective bargaining representative was initiated by and circulated among the employees. A majority of the employees signed the petition, evidencing their lack of support for the Union. A copy of this petition was given to Murphy. In September 1978, more than one year after the certification date, a second petition was initiated by and

circulated among the employees. A majority of the employees also signed this petition to "throw the Union out of Peat". On September 21, 1978, this petition was given to Murphy by the employees. After verifying the authenticity of the signatures on the petition, Murphy met with the employees to inform them that he had received the petition and that Peat no longer recognized the Union as bargaining agent for the employees in accordance with the employees' wishes as twice expressed in the petitions. Thereafter, Peat refused to bargain with the Union.

The Union filed unfair labor practice charges against Peat. The Board's Region 21 thoroughly investigated the matter, found that the charges were unsubstantiated by any evidence and, by letter dated November 22, 1978 (Exhibit "5" in the appendix hereto) dismissed the matter in its entirety. The Union appealed this decision to

the Board's General Counsel. Although the regional office had conducted the investigation and been closest to the facts, the General Counsel contradicted the region's findings and issued a complaint. A hearing was held before the Board's Administrative Law Judge William J. Pannier III. On April 17, 1980, Judge Pannier issued his decision finding that Peat had committed a violation of the NLRA which had never been alleged in the complaint nor litigated at the hearing. This decision was routinely adopted by the Board and by memorandum opinion of the court of appeals.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING FUNDAMENTAL DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Despite overwhelming evidence to the contrary, the Board found that petitioner violated the NLRA by threatening to discharge strikers in June 1978. However,

there was no complaint allegation or amendment concerning a threat to discharge strikers in June 1978 [1] nor was this matter litigated at the hearing and therefore was not properly before the Administrative Law Judge for resolution. The Board routinely adopted the findings of its Administrative Law Judge over petitioner's objections, and the court of appeals deferred to the Board's "expertise" by upholding the Board's decision.

The finding that an unfair labor practice occurred which was never alleged in the complaint nor litigated at the hearing is in direct conflict with the Court of Appeals for the Fifth Circuit's decision in Engineers and Fabricators, Inc. v. NLRB,

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1/ The only complaint allegation concerning any threat to discharge strikers specifically referred to September 21, 1978, which would not place petitioner on notice that a threat to discharge strikers in June had been charged and was to be litigated and, in fact, this matter was not charged nor litigated.

367 F. 2d 482 (5th Cir. 1967). In that case, the court refused to enforce the Board's finding of a violation which was neither charged in the complaint nor litigated at the hearing because to do so would offend fundamental concepts of procedural due process. The court stated that the purpose of the Board's complaint is "to notify the adverse party of claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing." 376 F. 2d at 485 (citations omitted). Similarly, the Board's applicable regulation, 29 C.F.R. § 102.15, requires that: "The complaint shall contain ... a clear and concise description of the acts which are claimed to constitute unfair labor practices...."

Other courts of appeals have recognized that these fundamental due process requirements must be met in federal agency

adjudications. In J.C. Penny Co., Inc., v. NLRB, 384 F. 2d 479 (10th Cir. 1967), the court noted that: "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law." 384 F. 2d at 483. These due process requirements were not met in the case at bar. The complaint allegation herein, that petitioner threatened to discharge strikers specifically on September 21, 1978, does not clearly and concisely describe the unfair labor pratice found by the Board, to wit: a threat to discharge strikers in June. Thus, the record does not support the contention that petitioner had notice that this matter was in issue.

Although the courts have recognized the Board's authority to decide an issue not specifically alleged in the complaint,

the issue must have been fully and fairly litigated by the parties. Soule Glass and Glazing Co. v. NLRB, 652 F. 2d 1055 (1st Cir. 1981). The test is whether the employer knew what conduct was in issue and had a fair opportunity to present his defense. 652 F. 2d at 1074.

In a complex and confusing case such as the instant one, which confusion was exacerbated by the numerous Spanish-speaking witnesses who required a translator at the hearing and whose testimony often consisted of inaccurate paraphrasing, it would be unfair to require petitioner to defend against endless possibilities of unfair labor practices. General Counsel could have easily amended the complaint to include another allegation, however this was never done. Thus, petitioner was never placed on notice that a threat to discharge strikers in June was in issue, and no defense was presented on this subject. If petitioner had been given such notice, the matter would have been fully

litigated and detailed evidence would have been presented. The one witness whose testimony touched on this matter would have been fully probed, and other witnesses would have been called. The prejudice to petitioner caused by the Board's ruling is obvious.

The petitioner's due process rights were further violated by the conduct of the Administrative Law Judge. Adjudications before the Board are based on "having a neutral, impartial trier of fact with the General Counsel serving as prosecutor. The ALJ may not, in effect, become a litigant by 'prosecuting' uncharged violations." Soule Glass and Glazing Co. v. NLRB. supra, 652 F. 2d at 1074. In NLRB v. Tamper, Inc., 522 F. 2d 781 (4th Cir. 1975), the Court of Appeals for the Fourth Circuit acknowledged that:

> While we do not doubt that the Administrative Law Judge in the exercise of his discretion may call attention to an uncharged violation which has been fully litigated by the parties, we do not believe he should under-

> take to decide an issue which he alone has injected into the hearing -- especially where, as here, the parties were never advised to litigate the issue. Once the Administrative Law Judge undertook the General Counsel's prosecutorial function by ferretting out evidence of uncharged violations and building a case against the defendant-employer he overstepped the permissible scope of his duties.

522 F. 2d at 789-790.

Like those cases, the case before the Court involves an Administrative Law Judge's finding of an unfair labor practice never alleged in nor amended into the complaint, which was not fully litigated at the hearing, and which neither party had notice was in issue. The court of appeals perpetuated the injustice to petitioner by deferring to the Board in its "rubber-stamping" of the Board's decision. The fact that the court's decision squarely conflicts with opinions of courts of appeals in other circuits and has resulted in a denial of petitioner's fundamental due process rights justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE EXERCISE OF THE RIGHT OF FREE SPEECH GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Administrative Law Judge, whose opinion was routinely adopted by the Board and the court of appeals, found that in June 1978 petitioner threatened to discharge strikers. This finding was based on the testimony of one Spanish-speaking witness who, in paraphrasing Murphy's remarks at the June meetings, recalled Murphy saying that strikers " were going to be replaced and that the people that took the jobs are going to have a job permanent...". Petitioner submits that the overwhelming weight of the evidence contradicts this finding in addition to the fact that this violation was never charged in the complaint nor litigated at the hearing. However, even assuming, arguendo, that Murphy did make this statement to the employees at the June meetings regarding negotiations with the

Union, the court's finding directly conflicts with the decisions of other courts of appeals which hold that statement is within the employer's First Amendment rights.

The employer's right to permanently replace economic strikers and to refuse to reinstate them if the replacements remain in their jobs is well established. NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 88 S. Ct. 543 (1967). The striker is then only entitled to an offer of reinstatement if a job for which he is qualified becomes available.

The Court of Appeals for the Second Circuit held that no threat occurred when an employer told its employees during a union organizing campaign that if they went on strike, they would be "replaced temporarily or in other circumstances they could be replaced permanently." NLRB v. Rollins Telecasting, Inc. 494 F. 2d 80 (2nd Cir. 1974), cert. denied, 419 U.S. 964, 95 S. Ct. 224 (1974). The court stated that

the employer was not responsible for delivering a lecture on the reinstatement rights of economic strikers and concluded that the "statement that economic strikers could lose their jobs 'temporarily or permanently' was within the protection of (NLRA) Section 8 (c)". 494 F. 2d at 82.

Similarly, the Court of Appeals for the First Circuit found that an employer's statement during a union organizing campaign that a number of people had lost their jobs during a previous strike was protected speech. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666 (1st Cir. 1979). The court in that case stated:

> That a union might call a strike, however, is a simple fact of life. So is the possibility that it may be unsuccessful. To state either cannot be condemned by the process of calling it a threat; the employer is not restricted to pleasant facts....Respondent's failure to state the full sequence, viz., that some employees had been replaced and not recalled, and its summary form that they had 'lost their jobs' is not significant.

598 F. 2d at 672.

In the instant case, petitioner provided a complete, accurate description of the consequences of a strike which the Union had threatened at the bsrgaining table. Petitioner was merely reporting to the employees in a permissible, non-coercive manner what had transpired at the negotiation sessions in an exercise of its right of free speech. The court of appeals' finding that petitioner engaged in an unfair labor practice directly conflicts with the above-cited cases as well as with this Court's consistent protection of the employer's freedom of speech as guaranteed by the First Amendment and the NLRA § 8 (c).[2/] NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918 (1969).

2/ 29 U.S.C. § 158 (c)

3. THE DECISION BELOW IS GROSSLY ERRONEOUS RESULTING IN A MISCARRIAGE OF JUSTICE WHICH HAS THE POTENTIAL TO AFFECT A SIGNIFICANT PORTION OF THE POPULATION.

The court of appeals' statement that substantial evidence supported the Administrative Law Judge's finding that Peat threatened to discharge strikers is erroneous. The substantiality of the evidence is measured by the consideration of all of the evidence and not just that which supports the Board's findings. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The "substantial evidence" referred to by the court of appeals consists of the isolated comments of one Spanish-speaking witness about a matter not in issue, and which was not pursued further at the hearing precisely for that reason. Moreover, an examination of the record would show that the great weight of the evidence, as well as logic, dictates a contrary conclusion.

The result of the court of appeals' judgment is that a grave injustice has been suffered by Peat's employees, and the decision is apt to have continuing adverse consequences for the bulk of the population which comprises this nation's work force. The decision has effectively denied Peat's employees the right to associate (or not to associate) freely with a union as guaranteed by the NLRA § 7 (29 U.S.C. § 157). The court of appeals' mandate ordered petitioner to bargain with a union which has twice been disavowed by a majority of the employees. The employees, who clearly desire to be free from union representation, have had their collective voice effectively silenced by the court of appeals. The petitioner, who listened to its employees and unlawfully refused to bargain with a union which lacked majority support, is being unfairly censured. These are the people that the NLRA was designed to protect, yet that very statute is now unfairly

being used to suppress them. To force them to retain union representation in the face of substantial evidence of their disaffection is a harsh and inequitable result.

The Administrative Law Judge reached his conclusion that petitioner engaged in unfair labor practices without any legal, evidentiary or logical support. The Board then "short-form" adopted his decision, which was, in turn, adopted by the court, in toto, without evidencing any study of the record itself which does not support these findings. The court of appeals appears to have deferred to the Board's so-called "expertise" in this matter, nullifying the right of the employees to freely choose whether they wish to have a bargaining representative and rendering the right of appeal nugatory. This sets a harmful precedent.

The harshness of the bargaining order imposed is exemplified by the Court of

Appeals for the Ninth Circuit's decision in NLRB v. Four Winds Industries, Inc., 530 F. 2d 75 (9th Cir. 1976). In that case, the court refused to uphold the Board's bargaining order even though the employer had threatened the employees with job loss if the union won the election, a direct conflict with that same court's judgment in the instant case. Petitioner herein submits that the record and case law does not support the finding that any violations of the NLRA occurred. However, even assuming, arguendo, that a threat to discharge strikers did occur, this would have merely been a technical de minimus violation, the effect of which would have been dispelled and dissipated one month later when the first petition was circulated and certainly three months later when the second petition was circulated. Thus, there would have been no impact whatsoever on the employees' choice to be rid of the Union. The imposition of a bargaining order, the most

severe remedy imposed in these cases, has resulted in overriding the twice expressed will of the majority to deprive the employees of their constitutional and statutory rights.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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